Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

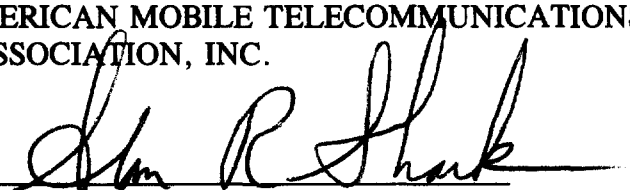
In the Matter of	)	
	)	
Amendment of Part 90 of the	)	PR Docket No. 93-144
Commission's Rules to Facilitate	)	RM-8117, RM-8030
Future Development of SMR Systems	)	RM-8029
in the 800 MHz Frequency Band	)	
	)	
and	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act -	)	
Competitive Bidding	)	
800 MHz SMR	)	

To: The Commission

COMMENTS OF THE
AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.

Respectfully submitted,

AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.

By: 

Alan R. Shark, President
1150 18th Street, N.W., Suite 250
Washington, D.C. 20036

Of Counsel:

Elizabeth R. Sachs, Esq.
Terry J. Romine, Esq.
Lukas, McGowan, Nace & Gutierrez, Chartered
1111 19th Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 857-3500

August 4, 1995

TABLE OF CONTENTS

SUMMARY

The FCC has requested comments in the 800 MHz SMR Proceeding to address the issues raised by the Supreme Court's recent decision in Adarand Constructors, Inc. v. Pena relating to the proposed treatment of designated entities in the 800 MHz Specialized Mobile Radio service auction. Specifically, the FCC's inquires as to whether the record in the 800 MHz SMR Proceeding is sufficient to establish a compelling interest to permit adoption of opportunity-enhancing measures for minority or women-owned business and, if a compelling interest exists, how the FCC could narrowly tailor such race-conscious or gender-conscious measures.

Based on AMTA's analysis of the Adarand decision and the record in the 800 MHz SMR Proceeding, AMTA is unable to find that the FCC has established a compelling interest in this proceeding to adopt race- or gender-conscious measures. AMTA has been unable to identify evidence, whether statistical, documentary or anecdotal, to support a determination that affirmative action is required to remedy particularized instances of discrimination in the 800 MHz SMR industry. To the contrary, the history of the 800 MHz SMR services reflects that the licensing and financing have been non-discriminatory and allowed all entities to competitively participate in the service.

As AMTA does not believe that a compelling interest exists to adopt race- or gender-conscious measures, it does not provide any suggested techniques to narrowly tailor the furtherance of such interest.

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144 RM-8117, RM-8030 RM-8029
and	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding 800 MHz SMR	)	PP Docket No. 93-253

To: The Commission

COMMENTS

1. The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association"), pursuant to the Federal Communications Commission ("FCC" or "Commission") Request for Comments in 800 MHz SMR Proceeding,[1/] respectfully submits its Comments on the appropriate measures to address the issues raised by the Supreme Court's recent decision in Adarand Constructors, Inc. v. Pena ("Adarand")[2/] relating to the proposed treatment of designated entities in the 800 MHz Specialized

---

[1/] Request for Comments in 800 MHz SMR Proceeding (DA 95-1651) released July 25, 1995 (Wireless Telecommunications Bureau)("Public Notice").

[2/] 63 U.S.L.W. 4523 (U.S. June 12, 1995)("Adarand").

Mobile Radio ("SMR") service auction.[3/] The FCC has invited additional comments on this specific matter because the Adarand decision was announced after the reply comment date in the 800 MHz proceeding and, thus, was not considered specifically by interested parties. The FCC seeks input generally on the following matters:

1. Does the Commission have a compelling interest in adopting opportunity-enhancing measures for minority and women-owned businesses in this particular service and, if so, what is that interest?

2. What evidence supports any compelling interest identified?

3. What, if any, race-conscious or gender-conscious measures would be appropriate to address any such compelling interest, and in what way could they be narrowly tailored to further it?

The Public Notice also solicits any and all evidence as to "past discrimination, continuing discrimination, discrimination in access to capital, underrepresentation and other significant barriers facing businesses owned by minorities and women in the 800 MHz SMR service and in licensed communications services generally."

I. INTRODUCTION

2. AMTA is a nationwide, non-profit trade association dedicated to the interests of the specialized wireless communications industry.[4/] The Association's

---

[3/] Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Further Notice of Proposed Rule Making, PR Docket No. 93-144, 59 FR 60111 (Nov. 22, 1994)("Further Notice of Proposed Rule Making" or "FNPR").

[4/] These entities had been classified as private carriers prior to the 1993 amendments to the Communications Act. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312, 392 ("Budget Act").

members include trunked and conventional 800 MHz and 900 MHz SMR operators, licensees of wide-area SMR systems, and commercial licensees in the 220 MHz band. These members provide commercial wireless services throughout the country. The systems they operate are classified by the FCC as Private Mobile Radio Service ("PMRS") or Commercial Mobile Radio Service ("CMRS"), the latter being considered a sub-category of common carrier service.[5/] Because these members will be affected by the competitive bidding procedures adopted in this proceeding, the Association has filed at every stage in this rule making and has a significant interest in its outcome.

II. BACKGROUND

3. In the Budget Act, Congress authorized the use of competitive bidding procedures to award licenses for certain spectrum-based services and mandated that small businesses, rural telephone companies, and businesses owned by members of minority groups and women ("Designated Entities") be ensured the opportunity to participate in the provision of such services. Applying this Congressional mandate to the 800 MHz services, the FCC issued a Further Notice of Proposed Rule Making which proposed, among other matters, to utilize bidding credits and a tax certificate program to encourage participation by businesses owned by women and minorities in upcoming 800 MHz SMR auctions and the future provision of 800 MHz services.[6/]

[5/] See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1418 (1994)("CMRS 2nd R&O"), Erratum, 9 FCC Rcd 2156 (1994); Third Report and Order, 9 FCC Rcd 7988 (1994)("CMRS 3rd R&O"), Erratum, 9 FCC Rcd ____ (1994).

[6/] FNPR at ¶¶ 87-106.

4. The proposal to encourage minority and women-controlled firms to participate in the 800 MHz SMR auctions consisted of two parts: bidding credits and a tax certificate program.[7/] The bidding credit was proposed to be in the amount of a forty percent (40%) credit for MTA-based SMR licenses in the "upper" two hundred (200) SMR frequencies and a twenty-five percent (25%) credit for licenses in the "lower" eighty (80) SMR channels. In proposing these figures, the FCC concluded that very few incumbent SMR providers are minorities or women, and concluded that a substantial discount might be necessary to achieve the appropriate level of participation. The agency also noted that comparable bidding credits had been adopted in other contexts, specifically regional and nationwide narrowband personal communications services ("PCS") and the Interactive Video and Data Service ("IVDS"). To prevent unjust enrichment by women and minorities trafficking in licenses acquired through the use of bidding credits, the FCC proposed the imposition of a forfeiture requirement on transfers of licenses to entities that are not owned by women or minorities.

5. In addition to its minority and women-focused designated entity proposals, the FCC sought comment on whether to adopt installment payments for small businesses and bidding credits for rural telephone companies. The agency queried how to define small businesses in this context.

[7/] The Budget Act provides the FCC authority to offer tax certificates to Designated Entities. Congress, however, repealed the FCC's authority to issue tax certificates pursuant to Section 1071 of the Internal Revenue Service Code. Public Law 104-7; 26 U.S.C. § 1071. It is unclear, therefore, as to whether the FCC retains authority to adopt its tax certificates program proposed in this rule making. Accordingly, Adarand's effect on this proposal is not discussed herein.

6. Further, the FCC requested comments on three additional provisions relating to designated entities in this band:

1. Whether the FCC should expand eligibility for installment payments to designated entities other than small businesses?

2. Whether there should be reduced upfront payments for any class of designated entity?

3. Whether the FCC should designate the lower 80 SMR channels as an entrepreneurs' block, and, if so, what special provisions should designated entities receive within an entrepreneurs' block with the assumption that entrepreneur eligibility should be set at a lower level than that applicable to PCS in light of the lesser costs associated with SMR system implementation?

7. In support of its proposals for designated entity participation in the 800 MHz service, the FCC stated that, apart from the specific Congressional directive in the Budget Act, it relied on the record in the Competitive Bidding docket's Fifth Report and Order.[8/] The agency cited various independent and government reports for the proposition that 1) women and minorities are underrepresented in the telecommunications industry, 2) women and minorities face discrimination in the private lending market, and 3) small businesses also have not become major participants in the telecommunications industry and routinely encounter financing difficulties. The Commission concluded that in the absence of any meaningful efforts to assist designated entities it should be expected that participation by these groups, particularly businesses owned by women and

[8/] Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532 (1994) ("Competitive Bidding Docket" or "Fifth Report and Order").

minorities, would continue to be severely limited.[9/]

8. There were few comments on these aspects of the Commission's proposal. The majority of commenting parties opposed the FCC's proposed use of auction for issuance of 800 MHz SMR licenses as inconsistent with the agency's statutory authority and with Congressional intent.[10/] The few parties that commented on these matters, for the most part, supported measures that would enhance the ability of small businesses generally, and incumbents specifically, to participate successfully in any auctions that might ensue.[11/] Only one or two participants specifically endorsed the FCC's proposed bidding credits and tax certificates for women and minority-owned business.[12/] Most commenting parties ignored these aspects of the FCC's proposal, presumably because they believed that auction authority did not exist or because they assumed the record would not support the specific propositions presented.

III. ADARAND DECISION

9. After the conclusion of the Reply Comment period and before the FCC adopted an Order in the 800 MHz SMR proceeding, the Supreme Court announced its decision in Adarand. That decision imposes a strict scrutiny standard of review on

---

[9/] Id. at ¶ 110.

[10/] See, e.g., AMTA Reply Comments at p. 28; The Southern Company Reply Comments at pp. 18-20.

[11/] See, e.g., AMTA Reply Comments at pp. 32-33; SMR Small Business Coalition Comments at p. 2.

[12/] See, e.g., Genesee Business Radio Systems, Inc. Reply Comments at p. 5; Morris Communications, Inc. Comments at p. 4.

remedial federal affirmative action programs[13/] that use racial criteria as a basis for decisionmaking, such as the FCC proposal to provide preferences to minorities in the 800 MHz auctions. Under the strict scrutiny standard, a racial classification must serve a "compelling interest" and must be "narrowly tailored" to serve that interest.

10. To establish a compelling government interest, the government must have "a strong basis in evidence" to support its conclusion that race-based remedial action is warranted, and such evidence should approach "a prima facie case" of discrimination against minorities. Croson, 488 U.S. at 500. A mere underrepresentation of minorities in a particular sector or industry when compared to general population statistics is an insufficient predicate for affirmative action. Id. at 501.

11. In Croson, the city of Richmond had relied on (1) testimonial evidence of discrimination and statistical evidence regarding the disparity between the number of prime contracts awarded by the city to minorities and the city's minority population and (2) the low number of minority business enterprises belonging to local contractors' associations. The Court found that this evidence was not probative of discrimination in contracting but reflected general societal discrimination. More probative evidence would have compared the number of qualified minority business enterprises in the local labor market with the number of contracts awarded to them and their representation in the local associations. Post-Croson lower courts have indicated that other types of evidence can

---

[13/] Adarand did not determine the constitutionality of the federal affirmative action program at issue in that case, nor did it explain how the strict scrutiny standard should be applied. Adarand basically extended the rules that City of Richmond v. J.A. Croson Co, 488 U.S. 469 (1989), applied to state and local affirmative action measures to federal programs.

be probative of discrimination:

a. Statistical evidence showing that the pool of qualified minorities would have been larger "but for" the discrimination that is to be remedied;[14/] or

b. anecdotal evidence of discrimination gathered through complaints filed by minorities or testimony in public hearings.[15/]

12. The Court also has enunciated several factors to determine if an affirmative action program is "narrowly tailored." The factors are:

a. Whether the government considered race-neutral alternatives before resorting to race-conscious actions;

b. The scope of the affirmative action program, and whether there is a waiver mechanism that facilitates the narrowing of the program's scope;

c. The manner in which it is used, i.e. whether race is a factor in determining eligibility for a program or whether race is just one factor in the decisionmaking process;

d. The comparison of any numerical target to the number of qualified minorities in the relevant sector or industry;

e. The duration of the program and whether it is subject to periodic review;

f. The degree and type of burden caused by the program on persons who do not belong to the favored groups;

13. According to the FNPR, the FCC relied on the congressional mandate in

---

[14/] See, e.g., Contractors Ass'n v. City of Philadelphia, 6 F.3d 990, 1008 (3d Cir. 1993); O'Donnel Constr. Co. v. District of Columbia, 963 F.2d 420, 427 (D.C. Cir. 1992).

[15/] See, e.g., Contractors Ass'n v. City of Philadelphia, 6 F.3d at 1002-03; Coral Constr. Co. v. King County, 941 F.2d 910, 919 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992).

the Budget Act and the record in the Competitive Bidding docket. The Fifth Report and Order in the Competitive Bidding docket states: "In the new auction law, Congress directed the Commission to remedy this serious imbalance in the participation by certain groups, especially minorities and women."[16/] Thus, the FCC clearly views its program as remedial in nature and the Adarand/Croson analysis applies. As discussed below, AMTA does not believe that the FCC has sufficient evidence in this proceeding, nor could it gather such evidence, to withstand judicial strict scrutiny review of its proposed Designated Entity preferences.

IV. DISCUSSION

14. At the outset, AMTA wishes to affirm its commitment to welcome inclusion in the 800 MHz community of qualified members of every segment of our heterogeneous society. The history of this service confirms that when barriers to entry are low and marketplace competition is encouraged, the resulting industry is less likely to reflect the "historical, societal discrimination" that has, in the past, supported governmental affirmative action programs. However, the Association must respectfully disagree with the Commission's suggestion that the government has a "compelling" interest, as defined by the Adarand decision and its predecessors, sufficient to justify adoption of race and/or gender-based measures to promote broader minority and female participation in the 800 MHz service. AMTA has been unable to identify evidence, whether statistical, documentary, or anecdotal, to support a determination that affirmative governmental action is required to remedy particularized instances of discrimination in

---

[16/] Fifth Report and Order at ¶ 110.

this discrete segment of the CMRS subcategory of the telecommunications industry. On the contrary, as described below, the record regarding ownership of 800 MHz systems not only is inadequate to reach such a conclusion, but confirms that barriers to entry for all designated entities[17/] were minimal by comparison with licensed communications services generally. Because the Association is unable to discern a compelling governmental interest adequate to support remedial action, it also is not prepared to suggest techniques to narrowly tailor the furtherance of that interest.

A. 800 MHz Licensing Has Been and Is Competitive and Non-Discriminatory

15. Unlike the majority of commercial, telecommunications opportunities, in particular mass media, local and long distance wireline, and cellular services, the 800 MHz industry was founded on the concept of intense competition. The Commission's rules were structured to ensure that there would be multiple providers of competitive services in every marketplace, and that spectrum aggregation would be predicated on a documented level of service to the public.[18/] Thus, particularly in the early stages in the industry, a typical urban market routinely supported twenty, thirty or even more

---

[17/] The one exception is rural telephone companies. Until this year, the Commission's rules prohibited all wireline common carriers, whether urban or rural, from owning SMR systems, a preclusion rooted in the preservation of a distinction between the provision of dispatch and mobile telephone service. Report and Order, GN Docket No. 94-90, 10 FCC Rcd 6280 (1995).

[18/] See, e.g., 47 C.F.R. § 90.621(a)(1)(iv) (maximum number of 800 MHz SMR frequency pairs to be assigned at one time to any licensee is five (5); 47 C.F.R. § 90.627(b) (providing limitations on the number of trunked systems per licensee); 47 C.F.R. § 90.631(c) (requiring a loading level of 70 mobiles per assigned channel prior to acceptance of applications for expansion of an existing SMR station in urban areas.)

independent 800 MHz SMR businesses.

16. Moreover, the operators of these systems typically were small businesses, often the prototypical "Ma and Pa" radio sales and service shop owners that exist in virtually every hamlet across the nation. These companies were attracted to participate in the 800 MHz SMR industry because of the low barriers to entry, including barriers to capital, and the localized nature of the service provided.

17. Traditionally, 800 MHz SMR licenses were awarded on a first-come, first-served basis. Applications were simple to complete, requiring virtually no legal, engineering or other technical review. The Commission required no evidence of financial capability to implement the system proposed, and asked for no reasonable assurance of site availability. Licenses were awarded as frequencies were available with the Commission itself completing the frequency availability analysis. Periodically, the Commission also has used lotteries to select among SMR applicants in instances of mutual exclusivity.[19/] Those lottery applications were no more difficult or expensive to prepare and prosecute, and indeed attracted participation by virtually every segment of the American public. Over the years, the Commission has from time to time imposed FCC filing fees to cover the cost of application processing.[20/] Those fees have ranged

---

[19/] See Second Report and Order, Docket No. 79-191, 90 FCC 2d 1281 (1982); Public Notice 3526, released April 11, 1983; Public Notice 1805, released January 6, 1986.

[20/] From 1977 to 1990, the FCC was without authority to impose filing fees so 800 MHz SMR applications, like all other FCC filings, were gratis.

from a low of $4.00 to the current high of $45.00.[21/] Thus, at no time has the cost of submitting an SMR application acted as a deterrent to any potential participant.

B. 800 MHz Licensees Have Had Non-discriminatory Access to System Financing

18. SMR licensees also have encountered perhaps even less than the normal difficulty in acquiring capital to support system implementation, irrespective of their gender or race. First, the cost of building the typical analog 800 MHz SMR system is relatively low. Depending on the type of equipment, site and ancillary services selected, the cost will normally range from $60,000.00 to more than $200,000.00 for a full-featured 20-channel system. Additionally, it is important to note that equipment suppliers in this industry traditionally have offered attractive vendor financing for system hardware, as well as system management, subscriber sales and other related services.[22/] Any party that acquired one of the many SMR licenses awarded in any reasonably sized market, essentially at no acquisition cost, was presented with a variety of low-cost alternatives for system implementation. In this environment, it is difficult, likely impossible, to conclude that there were barriers to entry by any interested party sufficient to warrant remedial governmental action.

19. Additionally, it is unclear on what basis, other than perhaps anecdotal

---

[21/] Since 1994, SMR licensees were also required to pay regulatory fees for new station licenses, which have ranged from $16.00 per year to $6.00 per year.

[22/] Several 800 MHz equipment vendors were contacted and asked for the percentage of customers seeking 800 MHz equipment which received vendor financing to purchase such equipment. Generally, approximately 30% to 85% of such customers (depending on the vendor), primarily start-up businesses, were provided vendor financing, including many minority- and women-owned businesses.

references, the Commission originally concluded that minorities and women have been underrepresented historically in the 800 MHz SMR service.[23/] Unlike in the mass media and common carrier services, the Commission has never required SMR, or any other private radio applicants, to provide ownership information. Parties that acquire SMR licenses in individual or partnership names are specifically identified on their authorizations. However, there is no reporting requirement at the Commission regarding the ownership of the multitude of SMR authorizations held by corporations. The FCC may be familiar with certain of those companies and their ownership makeup, typically the largest of them, but the agency has no record indicating the race or gender of the owners of the majority of SMR licensees. While AMTA certainly would not assert that minorities or females have ownership interests in SMR systems consistent with their representation within the population as a whole, it is not aware of any evidence on which the FCC could base the contrary conclusion. Without that degree of verifiable documentation, Adarand does not appear to permit a finding of specific discrimination adequate to support remedial action. Because there is no evidence of a compelling governmental interest, the Commission does not need to develop associated prophylactic, narrowly tailored measures to further that interest.

20. AMTA is persuaded that the most effective, and most legally defensible, means to permit and promote minority and female inclusion in the 800 MHz SMR

[23/] The FNPR refers generally to the underrepresentation of women and minorities in telecommunications and the difficulties that women and minorities face in obtaining capital, without any reference to evidence relating to the provision of 800 MHz SMR services in particular. FNPR at pp. 44-45.

community is adoption of measures designed to facilitate small business participation in whatever process is adopted to award SMR licenses. Assuming the Commission employs competitive bidding procedures to select among applicants, it should recognize the valuable contribution small businesses can provide to the industry by ensuring that these "entrepreneurs" have a reasonable opportunity to acquire spectrum in appropriate amounts and over appropriate geographic areas to maintain the historical, competitive nature of the industry.

CERTIFICATE OF SERVICE

I, Cheri Skewis, a secretary in the law office of Lukas, McGowan, Nace & Gutierrez, hereby certify that I have, on this 4th day of August, 1995, placed in the United States mail, first-class postage pre-paid, a copy of the foregoing Comments to the following:

* Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, DC 20554

* Commissioner James H. Quello
Federal Communications Commission
1919 M Street, NW, Room 802
Washington, DC 20554

* Commissioner Andrew C. Barrett
Federal Communications Commission
1919 M Street, NW, Room 826
Washington, DC 20554

* Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, NW, Room 844
Washington, DC 20554

* Commissioner Susan Ness
Federal Communications Commission
1919 M Street, NW, Room 832
Washington, DC 20554

* Regina Keeney, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NY, Room 5002
Washington, DC 20554

* Ralph Haller, Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 5002
Washington, DC 20554

* Gerald Vaughan, Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 5002
Washington, DC 20554

* Rosalind K. Allen, Chief
Commercial Radio Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 5202
Washington, DC 20554

* David Furth, Deputy Chief
Commercial Radio Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 5202
Washington, DC 20554

* Robert McNamara, Chief
Private Radio Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 5322
Washington, DC 20554

* John Cimko, Jr., Chief
Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1919 M Street, NW, Room 644
Washington, DC 20554

* William E. Kennard, Esq.
General Counsel
Federal Communications Commission
1919 M Street, NW, Room 614
Washington, DC 20554

Robert S. Foosaner, Esq.
Larry Krevor, Esq.
Nextel Communications, Inc.
800 Connecticut Avenue, NW, Suite 1001
Washington, DC 20006

Mary Brooner, Esq.
Motorola, Inc.
1350 Eye Street, NW, Suite 400
Washington, DC 20005

Emmett B. Kitchen
President
PCIA/NABER
1501 Duke Street, Suite 200
Alexandria, VA 22314

Mark Crosby
President and Managing Director
ITA/CICS
1110 North Glebe Road, Suite 500
Arlington, VA 22201

Michael Carper, Esq.
Vice President & General Counsel
OneComm Corporation
4643 S. Ulster Street, Suite 500
Denver, CO 80237

Jeffrey R. Hultman
President, Director and CEO
Dial Page, Inc.
301 College Street, Suite 700
Greenville, SC 29603-0767

Cheri Skewis

Cheri Skewis

* Via Hand-Delivery